

Honorable Benjamin H. Settle

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CLYDE RAY SPENCER, MATTHEW RAY
SPENCER, and KATHRYN E. TETZ,

Plaintiffs,

v.

FORMER DEPUTY PROSECUTING
ATTORNEY FOR CLARK COUNTY
JAMES M. PETERS, DETECTIVE
SHARON KRAUSE, SERGEANT
MICHAEL DAVIDSON, CLARK COUNTY
PROSECUTOR'S OFFICE, CLARK
COUNTY SHERIFF'S OFFICE, THE
COUNTY OF CLARK, SHIRLEY
SPENCER, and JOHN DOES ONE
THROUGH TEN,

Defendants.

NO. C11-5424 BHS

DEFENDANTS' RESPONSE TO
PLAINTIFF'S MOTION TO BAR
DEFENDANTS' REBUTTAL
EXPERT RONALD KLEIN

NOTED ON MOTION
CALENDAR: December 28,
2012

I. MATERIAL FACTS

On November 7, 2012, Dr. Ronald Klein was timely disclosed by defense counsel as a rebuttal expert on damages and his written report was provided in full compliance with Fed. R. Civ. P. 26(a)(2)(A), (B) and (D). Declaration of Jeffrey Freimund ("Freimund Decl.") at Ex. 1. Defendants disclosed Dr. Klein as an expert who would submit a declaration or affidavit supporting a motion *in limine* to exclude Dr. Kuncel's opinions (plaintiff's now

1 withdrawn expert on plaintiff's alleged damages). *Id.* In addition, defendant Davidson
2 disclosed that "Dr. Klein may also provide testimony at trial regarding the psychological or
3 emotional damage, if any, sustained by plaintiff Clyde Ray Spencer and regarding his
4 examination of plaintiff Clyde Ray Spencer, to be arranged by agreement of counsel subject to
5 the provisions of FRCP 35(b) or by motion, and the results of that examination." *Id.* Plaintiff
6 refused to agree to an examination by Dr. Klein so defendants moved to compel plaintiff to
7 submit to an examination by Dr. Klein. Dkt. 105.
8

9 On December 10, 2012, the Court granted defendants' motion for a Fed. R. Civ. P. 35
10 examination of Mr. Spencer by Dr. Ronald Klein. Dkt. 123. The Court reasoned that
11 "Spencer's complaint itself establishes good cause for such an examination to determine the
12 existence and extent of his injuries." *Id.* at p. 4. Thus, the Court ordered plaintiff to "submit
13 to examination by Dr. Klein." *Id.* at p. 6.
14

15 Later the same day this order was entered, defense counsel promptly offered four
16 alternative dates for Dr. Klein's examination of Mr. Spencer. Freimund Decl. at Ex. 2.
17 Plaintiff's counsel agreed to the latest date offered, December 21st. *Id.* The following day, on
18 December 11, 2012, defense counsel confirmed the date, time and location for Dr. Klein's
19 examination on December 21st. *Id.*
20

21 On December 12, 2012, plaintiff's counsel sent an email proposing several conditions
22 on how Dr. Klein's examination would occur and changing the start time for the examination.
23 Freimund Decl. at Ex. 3. Defense counsel agreed in part to some of those conditions and
24 agreed to allow plaintiff's counsel to take Dr. Klein's deposition following provision of his
25 written report of his examination, even though that deposition would necessarily occur after
26 the December 17, 2012 discovery cut-off. *Id.*

1 On December 13, 2012, plaintiff's counsel sent an email stating they would not be
 2 calling plaintiff's damage expert, Dr. Kuncel, as trial witness and unilaterally struck Dr.
 3 Kuncel's deposition that defense counsel had noted for December 17th. Freimund Decl. at Ex.
 4 4. Plaintiff's counsel also stated that because Dr. Klein was disclosed as a rebuttal expert to
 5 rebut Dr. Kuncel's opinions about Mr. Spencer's alleged emotional damages, Mr. Spencer
 6 would not appear for the court-ordered examination that had been mutually agreed to occur on
 7 December 21st. *Id.* Defense counsel responded that defendants expected plaintiff to comply
 8 with the Court's order that Mr. Spencer submit to an examination by Dr. Klein. *Id.* Later that
 9 same day, plaintiff's counsel filed the instant motion seeking to overturn the Court's prior
 10 order compelling Mr. Spencer to submit to an examination by Dr. Klein and barring Dr. Klein
 11 from testifying as an expert witness. Dkt. 124.
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13 II. ARGUMENT

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 15 As the Court previously ruled, "there is no genuine dispute that Spencer has put his
 16 mental condition in controversy" by claiming *inter alia* he has "posttraumatic stress disorder,
 17 severe anxiety and depressions; feelings of hopelessness and anger; difficulties with
 18 concentration; sleeplessness and nightmares; and side effects of medications he is on to
 19 manage these problems." Dkt. 123, at pp. 2, 4 (quoting Dkt. 103, at 1 and 5). Plaintiff's
 20 decision not to call Dr. Kuncel as an expert to support his claims of psychological and
 21 emotional damages does not change the fact that Mr. Spencer has put his mental condition in
 22 controversy.
 23

24 Indeed, plaintiff indicates he intends to testify that defendants caused his alleged
 25 psychological and emotional damage claims. Dkt. 124, p. 4 n. 1 (citing cases stating
 26 plaintiff's testimony alone is sufficient to support a jury's award of emotional damages). No

1 doubt plaintiff will also testify that he has a doctorate degree in clinical psychology. *See* Dkt.
2 1, p. 28, ¶¶ 187-90. Given his training in psychology, the jury could place more weight on
3 plaintiff's anticipated testimony that defendants caused his alleged psychological and
4 emotional damage.

5 Defendants should be permitted to rebut plaintiff's anticipated testimony that
6 defendants caused his alleged psychological and emotional damage just as defendants would
7 have been permitted to rebut Dr. Kuncel's testimony on the same claims. Plaintiff's motion to
8 overturn the Court's prior order compelling plaintiff to submit to examination by Dr. Klein
9 and to bar Dr. Klein from testifying would unfairly prejudice defendants by eliminating any
10 means to rebut plaintiff's testimony about his alleged psychological and emotional damages
11 and the causation of those alleged damages.
12

13 Plaintiff's decision to withdraw Dr. Kuncel as an expert plainly was a tactical decision
14 attempting to avoid the Court's order compelling Mr. Spencer's examination by Dr. Klein, in
15 hopes plaintiff would be allowed to testify about causation of his alleged psychological and
16 emotional damage without fear of the jury hearing any contrary evidence from defendants.
17 This attempted manipulation of the judicial system should not be countenanced.
18

19 Trials are supposed to be a search for the truth. Plaintiff should not be allowed to
20 manipulate the process by disclosing a damage expert, then withdrawing the expert when
21 improper and unsupported "opinions" are exposed by defendants' damage expert, then
22 arguing that plaintiff's withdrawal of his expert means plaintiff can testify about his alleged
23 damage and causation based on his own alleged psychological expertise, but defendants are
24 barred from offering any rebuttal evidence on causation and damages. Defendants should not
25 be penalized or sanctioned by having their damage expert precluded from testifying due solely
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1 to plaintiff's unilateral decision to withdraw his damage expert as a testifying witness, and to
2 provide that testimony himself.

3 The cases relied on by plaintiff in support of his motion to overturn the Court's order
4 compelling him to submit to examination by Dr. Klein and to preclude Dr. Klein from
5 testifying do not support his arguments. First, none of these cases deal with vacating a prior
6 Court order authorizing an independent psychological examination, so none provide support
7 for overturning the Court's prior order. Plaintiff fails to properly move for reconsideration or
8 vacation of the Court's prior order compelling him to submit to examination by Dr. Klein.
9 Even if he had so moved, plaintiff would be unable to meet the strict criteria for disfavored
10 motions for reconsideration (Local Rule CR 7(h) or motions to vacate (Fed. R. Civ. P. 60).
11 He did not oppose defendants' motion compelling examination by Dr. Klein by arguing he
12 was withdrawing Dr. Kuncel as an expert, as he could have argued at the time. Instead, he
13 gambled on the court denying defendants' motion and, when he lost that gamble, now
14 belatedly attempts to avoid the Court's order by raising a new argument (*i.e.*, withdrawal of
15 his expert) that he tactically chose not to present initially.

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18 Second, both of the cases relied on by plaintiff to support exclusion of Dr. Klein
19 involve situations where a plaintiff failed to timely disclose experts until the rebuttal expert
20 disclosure deadline. None involve the situation here, in which defendants timely disclosed
21 their experts and rebuttal experts in full compliance with Fed. R. Civ. P. 26(a)(2)(A), (B) and
22 (D), then the plaintiff unilaterally withdrew one of his experts yet still intends to present the
23 testimony the defense expert intends to rebut. More importantly, in each of the cases relied on
24 by plaintiff, the court permitted the rebuttal experts to testify despite defects in the plaintiffs'
25 rebuttal expert disclosures. *See Johnson v. Grays Harbor Commun. Hosp.*, 2007 WL
26

1 4510313, at *2 (W.D. Wash., December 18, 2007) (“Plaintiff’s rebuttal experts were timely
 2 disclosed, and the Court will not exclude Plaintiff’s rebuttal experts from testifying solely
 3 because plaintiff designated only rebuttal experts.”); *Lindner v. Meadow Gold Dairies, Inc.*,
 4 249 F.R.D. 625, 636 (D. Hawaii 2008) (“The mere fact that Plaintiff designated only rebuttal
 5 experts on these issues is not sufficient grounds to ... exclude their testimony.”). In both
 6 cases, the plaintiffs were permitted to call their rebuttal experts after the defendants rested and
 7 to present expert testimony rebutting the defendants’ case in chief. *Id.*

9 The same result should apply here. Defendants should be permitted to rebut plaintiff’s
 10 case in chief by calling Dr. Klein to rebut plaintiff’s causation and damage theory, even if that
 11 theory is presented only by plaintiff himself rather than by plaintiff and his now withdrawn
 12 expert, Dr. Kuncel. In order to competently provide this testimony, Dr. Klein should be
 13 permitted to examine and conduct testing of plaintiff consistent with the Court’s prior order.
 14 Dkt. 123. To hold otherwise would be to allow plaintiff to manipulate and control through
 15 artifice the otherwise competent and admissible testimony from Dr. Klein. The jury should be
 16 allowed to hear rebuttal expert testimony based on reliably applied principles and methods of
 17 psychological evaluation (ER 702(d)) addressing causation and plaintiff’s alleged
 18 “posttraumatic stress disorder, severe anxiety and depressions; feelings of hopelessness and
 19 anger; difficulties with concentration; sleeplessness and nightmares; and side effects of
 20 medications he is on to manage these problems.” *See* Dkt. 123, at pp. 2, 4 (quoting Dkt. 103,
 21 at 1 and 5). The sanction plaintiff seeks, of excluding expert testimony due to an opposing
 22 party’s noncompliance with Fed. R. Civ. P. 26(a)(2)(A), (B) and (D), is simply not applicable
 23 in this context where defendants have fully complied with the applicable rules.
 24
 25

26 The fact that defendants disclosed Dr. Klein as a rebuttal witness thirty days after

disclosing their other experts can hardly be categorized as causing any undue prejudice to plaintiff. Plaintiff was timely notified defendants intended to call Dr. Klein not only to support a motion to exclude Dr. Kuncel from testifying, but also to rebut plaintiff's damage theory based on properly administered psychological testing and evaluation. Freimund Decl. at Ex. 1. Defendants have also agreed to allow plaintiff to depose Dr. Klein after his examination report is completed even though the discovery cut-off will have passed. *Id.* at Ex. 3. Thus, there is no demonstrable prejudice to plaintiff should the Court deny his motion to exclude Dr. Klein's anticipated testimony following the Court-ordered testing and evaluation of Mr. Spencer.

III. CONCLUSION

Based on the foregoing reasons, plaintiff's motion to overturn the Court's prior order compelling Mr. Spencer to submit to examination by Dr. Klein and barring Dr. Klein from testifying should be denied. Plaintiff fails to provide any basis for overturning the Court's prior order compelling Dr. Klein's examination, and the two cases he relies on do not support excluding Dr. Klein from testifying in rebuttal to plaintiff's damage and causation theories.

RESPECTFULLY SUBMITTED this 24th day of December, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on December 24, 2012, I caused to be electronically filed Defendants Response to Plaintiff's Motion to Bar Defendants' Rebuttal Expert Ronald Klein and the Declaration of Jeffrey Freimund, with Exhibits 1-4 attached thereto, with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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